(2)

No. 04-196

IN THE

Supreme Court of the United States

DR. HARRY GAUS,

Petitioner,

v.

CONAIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO GAUS'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court overturn the unanimous panel decision below where, contrary to Gaus's main contention, the Federal Circuit followed its own precedent and precedent from this Court, construing the claim based solely on the express claim language and then consulting the specification, not for the purpose of importing limitations into the claim, but instead only to confirm its interpretation?

2. Should this Court exercise its GVR power in this case where none of the factors that typically persuade this Court to issue a GVR order are present?

PARTIES TO THE PROCEEDING BELOW

The parties are Petitioner, Dr. Harry Gaus, and Respondent, Conair Corporation.

There are no publicly held companies that own 10 percent or more of the stock of Conair Corporation.

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STATEMENT OF THE CASE

I. INTRODUCTION

This routine patent infringement case presents a straightforward application of well-settled law from this Court and the Federal Circuit on the issue of construing a patent claim. A unanimous panel of the Federal Circuit applied settled principles in interpreting the claim language at issue, and applied that interpretation to conclude that the accused product did not fall within the literal claim language. The Federal Circuit further concluded that the accused product could not be deemed to infringe under the Doctrine of Equivalents because of Gaus's "clear" disavowal of claim scope. Only the claim interpretation has been appealed, Petitioner apparently realizing that if the Federal Circuit's claim construction stands, that left no basis for a finding of infringement.

Gaus's petition is based on two faulty premises: first, that only the single word "pair" needed to be construed and not the entire relevant clause of the claim, and second, that the Federal Circuit flouted precedent, ignoring the claim language and relying exclusively on the specification to import a limitation into the claim. Gaus is incorrect as a matter of law on the first point, and simply wrong on the facts on the second point.

Gaus "at a minimum" seeks a GVR order, a request that, if granted, Respondent believes would effectively create an entirely new category of GVR cases, substantially increasing the burden on this Court and the Appellate courts. Rather than being based on the usual intervening court decision (or other development indicating a definitive change in law or fact), Gaus's request is tied only to an order from the Federal Circuit announcing that court's intention to

rehear *en banc* its *Phillips* decision at some unspecified point in the future. The issues in *Phillips*, however, are not even implicated in this case.[1] The order thus fails this Court's "reasonable probability" test.

For these reasons, this Court should preserve its scarce judicial resources and deny certiorari to the questions presented in Gaus's petition.

II. THE TECHNOLOGY UNDERLYING GAUS'S '047 PATENT

In order to fully understand the Federal Circuit's opinion, a basic understanding of the technology at issue is useful. The technology claimed by Gaus's '047 patent is a type of shock hazard protective device for use in electric appliances, such as hair dryers, known as Immersion Detection Circuit Interrupters (IDCIs). (App. A-73 – App. A-102.)[2] Such devices protect a user against electric shock by disconnecting the appliance from the power source in the event the appliance contacts water in which the user may be standing. The '047 patent relates only to certain asserted improvements to IDCIs, which were generally known in the prior art at the time Gaus filed his patent application.

In the '047 patent, the IDCI is located in the housing of the appliance (a hair dryer) to be protected. (*See, e.g.*, App. A-82.) The IDCI works by detecting immersion based on a change in impedance resulting from water entering into

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[1] Interestingly, all three judges on the unanimous Gaus panel voted for the *en banc* proceeding.

[2] Citations to "App. A- __" refer to the Appendix submitted with Gaus's Petition and citations to "A___" refer to the Joint Appendix filed below.

the interior of the hair dryer. The impedance change is measured between two probes located within the hair dryer housing.[3] When water bridges the probes, the IDCI senses the impedance change and disconnects the hair dryer from the power source before water reaches any voltage-carrying component of the electrical operating unit of the hair dryer.[4] By disconnecting power before water hits any voltage-carrying component, the patented IDCI achieves the critical goal of protecting the operator from electric shock. (App. A-79; App. A-82.) However, as disclosed and claimed in the patent (*see* pages 4-7 *infra*), this necessitates that the probes – which are what responds to the penetrating water – be separate and independent from the electrical operating unit.

III. GAUS DISAVOWED COVERAGE OF CONAIR'S ACCUSED DEVICES

The Federal Circuit, in its review of the '047 patent, leaves no doubt that Gaus surrendered coverage of appliances like Conair's accused hair dryers that use a single "sense wire" working in conjunction with voltage-carrying components of the appliance to detect the presence of water.

A. The Patent Claim Requires a Pair Of Probes that is Separate From the Electrical Operating Unit

The Federal Circuit found that the correct interpretation of the claim limitation at issue derives from the claim language itself when considered in its entirety, and not

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[3] Impedance is simply a measure of the resistance to current flow.

[4] The term "electrical operating unit" refers to the voltage-carrying components of the hair dryer, such as the heater coil and fan motor. (App. A-3.)

from defining an individual word. (App. A-7 – App. A-8.) Gaus's petition, however, erroneously focuses only on the meaning of a single word, "pair," severing it from the rest of the claim language of which it is a part. (*See, e.g.*, Gaus Pet. at 3, 7-9, 19-20.) Gaus's improper narrow focus was properly rejected by the Federal Circuit.

The express language of asserted claim 12 recites, separately and distinctly, in pertinent part, the impedance-detecting "pair of … probe networks" ("pair of probes") and the "electrical operating unit." (App. A-97 – App. A-98.)[5] As the Federal Circuit pointed out:

> *The claim lists the "electrical operating unit" separately from the "pair of spaced-apart electrically exposed conductive probe networks," and does not suggest that the "pair of ... probe networks" consists in part of a portion of the "electrical operating unit." Rather, the clear implication of the claim language is that the pair of probe networks is*

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[5] 12. A hazard prevention device for an electrical externally powered apparatus comprising:

> *a housing, said housing having at least one opening and said housing comprising an electrical operating unit and a pair of spaced-apart electrically exposed conductive probe networks, said pair being responsive to the entry of a conductive fluid electrically reducing the impedance between said probe networks of said pair;*
>
> * * *

> *a distinct component, separate from the electrical operating unit ....*"

(App. A-8.)

Supporting this "implication" is the fact that claim 12 recites a functional independence between the pair and the operating unit. Specifically, the claim states that a semiconductor switch "gate input [is] excited *only* upon a low impedance between said probe networks of said pair of probe networks." (App. A-98 (emphasis added).) That is, *only* a decrease in the impedance between the two probes of the pair of probes triggers the protection circuit that disconnects power (not a decrease in impedance between one of the probes (or even the "pair of probes") and the electrical operating unit).

In sum, the plain language of the claim, when properly considered in its entirety, requires a "pair of probes" that is separate and independent from the electrical operating unit.

B. The '047 Specification Defines the Pair of Probes as Excluding the Electrical Operating Unit

Contrary to Gaus's argument (*see, e.g.*, Gaus et. at 20), the Federal Circuit was clearly correct that the requirement of separateness, *i.e.*, that the "pair of probes" excludes the electrical operating unit, is not an isolated teaching, but one that courses throughout the '047 specification. Specifically, the Federal Circuit found that the specification distinguishes the invention from the prior art in that the "prior art devices would trigger the protective circuit only when there was a direct connection between the water and the power supply circuit", which necessarily resulted in

an electrical shock, albeit a less than lethal one (App. A-10, A-80 – A-81.)

The Court went on to point out that the "Summary of the Invention" states:

> *The object of the invention is to devise a protective device ... which device will respond ... independently of the operating state of the apparatus, so as to protect the user from electric shock."*

(App. A-82 (emphasis added).) The Summary of the Invention section continues and notes that

> *With the combination of features according to the invention one has a protective device which disconnects the voltage of the house wiring ... when a conductive fluid such as water penetrates into the apparatus housing, and said device accomplishes this disconnection before the user can be connected to voltage-carrying exposed parts via the fluid.*

(App. A-83 (emphasis added).)[6] The specification later provides that

> *The electrical double conductor of the probe should be configured in such a way that the trigger switch circuit will respond before the penetrating water reaches any other parts of*

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[6] Gaus's assertion that this excerpt "merely discusses one embodiment" (Gaus Pet. at 9) is wrong. The quoted language is from the Summary of the Invention section of the '047 patent. (App. A-83.)

> *the electrical apparatus which have a voltage on them ([as being] e.g., the heating coil, in the case of a hair dryer).*

(App. A-89.)[7]

Thus, the specification – like the claim itself – requires a "pair of probes" that are separate from and independent of the electrical operating unit.

IV. THE FEDERAL CIRCUIT'S DECISION

The jury found that Conair infringed claim 12 (the sole claim litigated) only under the Doctrine of Equivalents. Conair's appeal to the Federal Circuit argued that the district court's claim construction, which erroneously focused only on the word "pair," was as a result incorrect. The Federal Circuit agreed that the district court erred as a matter of law in failing to construe the entire clause in the claim and determined, based only upon the claim language, that the "pair of probe networks is a distinct component, separate from the electrical operating unit" (App. A-7 – App. A-8.)

In reaching its decision, the Federal Circuit applied its well-established precedent. The Federal Circuit began its task of construing the claim by properly "focus[ing] on the critical claim language," which it noted was the recitation that the housing included "an electrical operating unit and a pair of … probe networks." (App. A-7 – App. A-8.) The court noted that the claim lists the two items "separately"

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[7] Contrary to Gaus's suggestion (Gaus Pet. at 8-9), Gaus's amendment during prosecution compels interpreting "should" as "must" instead of "may." The specification originally used "may" (A9015), but Gaus changed the specification to refer to "should." The logical conclusion is that Gaus intended "should" to be a mandatory word.

and "does not suggest that the 'pair of ... probe networks' consists in part of a portion of the 'electrical operating unit.'" (App. A-8.)

Accordingly, the Federal Circuit reasoned that the proper construction required a "pair of probes" that are distinct and separate from the electrical operating unit. Such a construction, the Federal Circuit noted, is supported by "the claim language itself." (*Id.*, n.2.)[8]

Armed with its claim-language based interpretation, the Federal Circuit then consulted the specification to "confirm[] that interpretation" as the correct one. (App. A-8.) Initially, the Federal Circuit noted that the specification failed to suggest any overlap (structural or functional) between the "pair of probes" and the electrical operating unit but instead "plainly describe[d] the two components as separate." (*Id.*)

The Federal Circuit parsed the specification in great detail, citing the many instances that the specification supported a claim construction requiring separateness. (*See, e.g.*, App. A-9 – App. A-11.) This led the court to conclude, correctly, that the specification (like the claim) indicated that the "pair of probes" and the electrical operating unit were "plainly required" to be separate components:

> *[T]he specification explains that "[t]he object of the invention is to devise a protective device ... which device will respond in an extremely short time ... independently of the*

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[8] The Federal Circuit also noted that "even if the claim language itself" did not require separateness, the specification would because "there is in the specification 'a clear case of disclaimer of subject matter." (App. A-8, n.2.)

> *operating state of the apparatus, so as to protect the user from electric shock." 47 [sic – '047] patent, col. 2, ll. 55-61 (emphasis added). The invention therefore cannot encompass a hairdryer with a protective device that relies on current passing between a probe and the electrical operating system, since such a device would be triggered only when the hair dryer was operating and voltage was being applied to the electrical operating system. The specification thus plainly requires that the pair of probe networks be separate from the voltage-carrying electrical operating unit of the device.*

(App. A-10 (emphasis in original).) That the specification also distinguished prior art devices which, unlike the claimed device, shocked the user before disconnecting power, further confirmed the propriety of the Federal Circuit's construction. (App. A-10 – App. A-11.)

Importantly, the Federal Circuit explained that the specification attributed the separate and independent nature of the two components to "the invention" itself:

> *The specification, however, states that "according to the invention" the protective circuit "accomplishes this disconnection before the user can be connected to voltage-carrying exposed parts via the fluid which has entered the housing." '047 patent, col. 3, ll. 34-42 ["Summary of the Invention"]. The specification thus demonstrates that the invention itself requires that the user be completely protected from shock, in contrast*

> *to prior art devices that exposed the user to a brief, non-lethal shock.*

(App. A-11.) Accordingly, the Federal Circuit rejected Gaus's argument (repeated in Gaus's petition, *see, e.g.*, Gaus Pet. at 7-9) that the specification described the limitation only in connection with a preferred embodiment. (*Id.*)

Respondent notes that Gaus does not seek certiorari on the issue of infringement when the claim is construed as found by the Federal Circuit panel. Accordingly, that issue is not addressed here.

REASONS FOR DENYING THE WRIT

I. THE FEDERAL CIRCUIT DID NOT IGNORE THE CLAIM LANGUAGE

This Court should not expend its extremely limited resources by accepting this routine patent infringement case in which the Federal Circuit applied only well-settled precedent to arrive at the proper claim construction. That precedent establishes the primary role of the claim language in the claim construction analysis. *See, e.g., SRI Int'l v. Matsushita Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (*en banc*) ("It is the claims that measure the invention.").[9] The Federal Circuit has never wavered from the notion that the central focus of claim construction is the claim language

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[9] The Federal Circuit's uniform and settled precedent comports with this Court's precedent. *See, e.g., Altoona Publix Theaters, Inc. v. Am. Tri-Ergon Corp.*, 294 U.S. 477, 487 (1935) ("Under the statute, it is the claims of the patent which define the invention."); *Merrill v. Yeomans*, 94 U.S. 568, 570 (1876) ("Th[e] distinct and formal claim is, therefore, of primary importance, in the effort to ascertain precisely what it is that is patented.").

itself.

In an effort to avoid this well-established authority, the arguments presented in Gaus's petition seriously distort the Federal Circuit's opinion, repeatedly misstating the Federal Circuit's opinion. Contrary to what Gaus asserts, the Federal Circuit undeniably began with the claim language. As shown above, there is no merit to Gaus's allegation that the Federal Circuit ignored precedent by going "straight to the specification and import[ing] a limitation, 'separate,' effectively changing the language and scope of the claims." (Gaus Pet. at 8; *id.* at 20.)

Equally unavailing and inapt are Gaus's arguments concerning the ordinary and customary meaning of the word "pair." (*See, e.g.*, Gaus Pet. at 3, 7-9, 19-20.) As noted above (*see* pages 9-10 *supra*), Conair's appeal did not challenge the district court's construction of "pair," but rather alleged that that court erred in construing only that word instead of construing the entire "pair of probes" limitation. *Apex Inc. v. Raritan Computer, Inc.*, 325 F.3d 1364, 1372 (Fed. Cir. 2003) ("primary source" of error lies in focus on single word "as opposed to the limitation[n] as a whole"). *See also Hockerson-Halberstadt, Inc. v. Converse Inc.*, 183 F.3d 1369, 1374 (Fed. Cir. 1999). ("Proper claim construction, however, demands interpretation of the entire claim in context, not a single element in isolation.") For the same reasons, Gaus's arguments about the amount of deference owed to the district court's construction deserve little if any attention. (*See, e.g.*, Gaus Pet. at 8.)

II. THE FEDERAL CIRCUIT FOLLOWED SETTLED PRECEDENT OF ITS OWN AND FROM THIS COURT CONCERNING THE ROLE OF THE SPECIFICATION IN CLAIM CONSTRUCTION

As discussed above, in the instant case, the Federal Circuit initially interpreted the claim based only on "the critical claim language." (*See* pages 7-8 *supra*.) The court then consulted the specification to determine if its proposed construction – that the "pair of probes" is a "distinct component, separate from the electrical operating unit" – was consistent with Gaus's description of the invention. (App. A-8 – App. A-11.) The Federal Circuit concluded that "[t]he specification confirms that interpretation" (App. A-8), explaining that "[t]he specification thus plainly requires that the pair of probe networks be separate from the voltage-carrying electrical operating unit." (App. A-10.)

That general approach to claim construction is entirely consistent with settled Federal circuit precedent, *see, Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*) ("Claims must be read in view of the specification, of which they are a part."), *aff'd* 517 U.S. 370 (1996), and this Court's equally established precedent, *see, e.g., U.S. v. Adams*, 383 U.S. 39, 49 (1966) ("[I]t is fundamental that claims are to be construed in light of the specification and both are to be read with a view to ascertaining the invention."); *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211, 217 (1940) ("The claims of a patent are always to be read or interpreted in the light of its specification.").

The Federal Circuit properly looked to the specification only to "confirm" its claim language-based interpretation after reviewing the claim first. (App. A-8 –

App. A-11.) The opinion refers to the disclaimer in the specification, but only as an alternative ground for the court's conclusion that the "pair of probes" is a separate component. "[E]ven if the claim language itself did not support the interpretation we adopt, there is in the specification 'a clear case of disclaimer'" of claim scope. (App. A-8, n.2 (citation omitted).)

Moreover, contrary to Gaus's assertion that the panel "only mentioned it [the disclaimer] in a footnote" (Gaus Pet. at 20, 23), the Federal Circuit devoted nearly two pages to the disclaimer issue in connection with addressing equivalent infringement (not claim construction). (App. A-13 – App. A-14.) There, the Federal Circuit reviewed its precedent and explained in detail the basis for its conclusion that because Gaus "disavowed coverage of devices in which the two components are not separate ..., [Gaus] cannot reclaim that surrendered claim coverage by invoking the doctrine of equivalents." (*Id.*)

Gaus's other allegation – that the Federal Circuit "created an unprecedented and untenable doctrine of 'specification estoppel'" (Gaus Pet. at 7; *see id.* at 19, 23) – is also erroneous and handily dismissed. The words "specification estoppel" appear but once in the Federal Circuit's decision, and then only in connection with the Court describing Conair's arguments in its Rule 50(a) motion. (App. A-5.)

Finally, although the Federal Circuit has decided to rehear the *Phillips* case *en banc*, that in and of itself is no indication that the Federal Circuit believes that the general approach to claim construction unquestionably applicable in this case was wrong, or that post-*Phillips* a different approach would be followed. This is so because, as discussed below (*see* pages 18-19, *infra*), the *Phillips* court

will be addressing issues that are not present in every claim construction case and certainly not relevant to the instant case.[10]

For at least these reasons, this Court should deny certiorari on Gaus's first question presented.

III. THIS CASE DOES NOT MERIT A "GVR" ORDER

A. This Case Fits None of the Categories Warranting Exercise of the Court's Discretionary "GVR" Power

As Gaus admits (Gaus Pet. at 26), the intervening event that typically prompts a "GVR" order is issuance of a *decision*, either by this Court or a State Supreme Court, that this Court believes will affect the outcome on remand. Neither event has occurred here. The only basis for Gaus's alternative request for a "GVR" order is the Federal Circuit's July 21, 2004, order granting rehearing *en banc* in the *Phillips* case.[11] (App. A-103 – App. A-108; Gaus Pet. at 24-25.)

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[10] The fact that all three members of the unanimous panel in this case were part of the majority voting for the *en banc* hearing in *Phillips*, further suggests that the decision here stayed well within the bounds of the Federal Circuit's well-settled precedent.

[11] While issuance of a new State Supreme Court decision may warrant a GVR order to a Federal court of appeals where the new decision makes clear that the federal court applied state law incorrectly, the Federal Circuit's issuance of its order to rehear *Phillips* presents a distinctly different situation. Gaus's analogy (Gaus Pet. at 26) therefore fails. Nor does this Court's *Gulf* case, which also dealt with the impact of one court's decision on a case before this Court on appeal from another court (*id.*), help Gaus.

Gaus cites *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996), as support for issuing a "GVR" order based on the statement that this Court grants such orders "in light of a wide range of developments." (Gaus Pet. at 26.) However, the list of "GVR" categories in *Lawrence* does not include a mere order announcing a future rehearing *en banc*. *Lawrence*, 516 U.S. at 166-67; *see also* Shaun P. Martin, *Gaming the GVR*, 36 AZSLJ 551, 559-60 (2004) (listing types of cases serving as the basis for a GVR).[12] Following Gaus's theory, practically every patent case decided by the Federal Circuit last term would have to be sent back. This cannot be.

The argument made by Gaus for a GVR order fails because the actual dispute in this case was whether the lower court was correct in limiting its construction to the single word "pair," as opposed to the approach taken by the Federal Circuit, which looked at the entire clause of the claim that included the word "pair," *i.e.*, "the housing of the claimed apparatus comprises 'an electrical operating unit and a pair of spaced-apart electrically exposed conductive probe networks'"(App. A-7 – App. A-8.) From that quoted claim language, the Federal Circuit found that "the clear implication of the claim language is that the pair of probe

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[12] The article identifies many categories, but none encompass or can reasonably be analogized to issuance of an order to rehear a case: "intervening Supreme Court precedent, federal statutes, state supreme court decisions, state statutes, agency regulations, proposed changes in state agency policies, changes in position by the Solicitor General or a state attorney or solicitor general, changed factual circumstances, new local federal appellate procedures, ongoing district court proceedings, and the introduction of new contentions on appeal." (Martin, 36 AZSLJ at 559-560 (citations omitted).) The article also refers to a new "hold" category, but that category is for cases (unlike the instant case) "that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted." (*Id.* at 559.)

networks is a distinct component, separate from the electrical operating unit of the claimed invention." (App. A-8.)

Gaus fails to cite one case in which this Court has GVR'd a case based only on an order announcing a future rehearing. (Gaus Pet. at 24-30.) Nor could counsel for Respondent Conair find such a case. Moreover, Gaus does not argue for creation of a new GVR category for cases such as this one. Consistent with this Court's pronouncement that "our GVR power should be exercised sparingly," *Lawrence*, 516 U.S. at 173, Gaus's request should be denied.

B. The Federal Circuit's Order to Rehear the Phillips Case En Banc Does Not Meet This Court's "Reasonable Probability" Test

This Court applies a "reasonable probability" test in determining whether or not to issue a "GVR" order:

> *Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe potentially appropriate.*

Lawrence, 516 U.S. at 167. This case fails to meet that test.

First, the Federal Circuit's *Phillips* order is not even a development to which the test can be properly applied because the order announces no changes to the law that the panel here relied on in making its ruling. The *Phillips* order

merely identified certain questions that if answered one way may change some law, but if answered another way, may not. Any changes that do result will be set forth in the decision the *en banc* court ultimately issues, but one can only speculate at this point what those changes, if any, may be. However, predictions regarding the content of the future rehearing decision, do not provide the "reasonable probability" required by *Lawrence*. Gaus's suggestion otherwise (Gaus Pet. at 27) should be rejected.

Indeed, the *Phillips* case is not a likely candidate for such a test, because the issues to be decided in *Phillips* are unlikely to affect the issues here. Gaus's statement that the two cases "pose identical issues" (Gaus Pet. at 25) lacks merit.

Of the seven questions presented in the *Phillips* order, Gaus identifies only three as being relevant to this case. (Gaus Pet. at 28.) However, two of those three questions relate specifically to the competing roles of the dictionaries and the specification in claim construction (App. A-105), an issue not implicated in this case. Likewise, the third question, which concerns whether a district court's claim construction is due any deference on appeal (App. A-106), is irrelevant here.[13] In any event, the district court here relied solely on the meaning of the word "pair" and improperly ignored other language in claim 12 that the Federal Circuit based its decision on. There is no real dispute that the Federal Circuit followed the proper

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[13] Indeed, this Court's precedent suggests that where claim construction presents a pure legal question, a district court's interpretation is entitled to no deference on appeal. *Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("[Q]uestion[s] of law ... must be resolved *de novo* on appeal."; *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable.")

procedure here, and *Phillips* does not suggest otherwise. There is no merit to Gaus's assertion that the issues in *Phillips* "proved dispositive in the present case." (Gaus Pet. at 28.) While Gaus may continue to disagree with the Federal Circuit's decision, that is no ground for a GVR order.

The only real overlap between this case and *Phillips* is that both concern claim construction. However, virtually every patent infringement case heard by the Federal Circuit involves claim construction. Accordingly, if, as Gaus suggests, the *Phillips* order does justify a GVR order here, then it will warrant a GVR order in the hundreds of clam construction cases that will likely be issued by the Federal Circuit between the date of the *Phillips* order and the date the *Phillips* court hands down its *en banc* decision. That alone suggests that Gaus's request should be denied.

Finally, even if *Phillips* could arguably be considered relevant, the timing of these two cases indicates that the Federal Circuit does *not* think the decision here rested on a premise that would be rejected on remand in light of any future *en banc* decision. As Gaus notes (Gaus Pet. at 24), the unanimous panel decision here issued only a week before the panel decision in *Phillips*, and included Judge Dyk, who dissented in *Phillips*. Gaus's combined petition for panel rehearing and rehearing *en banc* was thus before the Federal Circuit at the same time the *Phillips* combined petition was being considered. That the Federal Circuit denied Gaus's petition but granted Phillips' petition evidences the two cases' dissimilarities. Indeed, if, as Gaus contends, the issues in the two cases are "identical" (*id.* at 25), surely the Federal Circuit would have also granted Gaus's petition.

IV. THE EQUITIES DO NOT FAVOR GAUS

"Whether a GVR order is ultimately appropriate depends further on the equities of the case." *Lawrence*, 516 U.S. at 167-168. The equities, however, counsel against granting the relief requested.

Gaus asserts that "judicial economy and fairness" warrant considering this case "in tandem with *Phillips* because both cases present the same legal issues" (Gaus Pet. at 27), but the cases are very different. Moreover, "fairness" favors Conair over Gaus. Conair has been defending itself against Gaus's infringement allegations for over 10 years and it is time to remove the legal cloud associated with being a patent infringement defendant from Conair's sky.

CONCLUSION

For the foregoing reasons, Conair urges the Court to deny Gaus's petition for a Writ of Certiorari in its entirety.

Respectfully submitted,

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